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## A cloud of suspicion – UK's CMA to probe the hyperscalers – Amazon, Microsoft, Google...

On Thursday 5 October 2023, the Office of Communications ("**Ofcom**") referred the UK's cloud infrastructure services market to the Competition & Markets Authority ("**CMA**") for an in-depth market investigation.<sup>1</sup> The decision to make the market investigation reference ("**MIR**") follows the conclusion of Ofcom's initial market study, which was launched in October 2022 as part of Ofcom's [new programme of work](#) that is focusing heavily on digital markets.

The decision to make the MIR is reflective of the importance that cloud infrastructure and related services have to the UK's (increasingly digitalised) economy. It is yet another development which indicates the significant focus that UK and EU regulators have on digital markets. Indeed, between the new pro-competition regime for digital markets proposed under the Digital Markets, Competition and Consumer Bill ("**DMCCB**") (see our briefing [here](#)) and the recent creation of the Digital Markets Unit ("**DMU**") within the CMA itself, the decision to conduct an in-depth investigation into the cloud infrastructure services market seems unsurprising in this context.

### Background

MIRs are made following the conclusion of a preceding market study. Broadly speaking, these investigatory powers are used to focus on the overall functioning of markets as a whole and are used to identify specific market failures that could be affecting businesses and/or consumers in the UK.

Market studies – which can be conducted by the CMA or a sectoral competition regulator like Ofcom – constitute an initial assessment of a particular market(s). Conducted over a 12-month period, they are the precursor to an in-depth market investigation (a Phase 1 which can lead to a Phase 2, to frame it in merger control terminology). An MIR will be made if the relevant regulator (here, Ofcom) has identified

any adverse effect(s) on competition ("**AECs**") that merit a more prolonged and detailed examination.

Given the extensive analysis required and the burdens placed on parties subject to market investigations – where, among other things, the CMA will conduct site visits, require the production of documents, issue detailed information requests and hold interviews with relevant personnel – MIRs are not lightly accepted by the CMA. Once an MIR is accepted, the market investigation will be led by a group of CMA panel members which will comprise a mix of business analysts, accountants, lawyers and economists.



### What are the concerns with cloud infrastructure services?

Cloud computing involves the provision of remote access to computing resources (e.g., data storage and networking) and is underpinned by infrastructure comprising physical servers and virtual machines which are hosted in data centres around the world. As Ofcom notes in its [Final Report](#),<sup>2</sup> cloud computing is being rapidly adopted by businesses across a broad spectrum of the UK economy and has become an integral part of how digital services are delivered to consumers.

Cloud infrastructure services are dominated by three main providers in the UK: Amazon Web Services

<sup>1</sup> Ofcom's press announcement can be found at: <https://www.ofcom.org.uk/news-centre/2023/ofcom-refers-uk-cloud-market-to-cma-for-investigation>

<sup>2</sup> Ofcom. *Cloud services market study – Final Report*. 5 October 2023. Available at: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0027/269127/Cloud-services-market-study-final-report.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0027/269127/Cloud-services-market-study-final-report.pdf)

("AWS"), Microsoft and Google. AWS and Microsoft together have a 70-80% share of the cloud infrastructure services market in the UK whilst Google, which is the next closest competitor, has a market share between 5-10%. AWS, Microsoft and Google have been labelled as "**hyperscalers**" on account of the market power they collectively hold.

Despite the fact that Ofcom has noted that some features of the market are delivering benefits for consumers, the regulator has also noted three factors that it fears will further entrench the hyperscalers' dominance over time and ultimately result in adverse outcomes in the form of higher prices, lower quality and/or lack of innovation:

- 1. Egress fees:** These are fees imposed when a customer chooses to "egress" – i.e., transfer their data out of a cloud provider's infrastructure. Ofcom has identified that hyperscalers charge significantly higher egress fees than other cloud infrastructure service providers. The likely effect of this is that customers will be discouraged from switching to a competitor.
- 2. Technical barriers:** The cloud services infrastructure market is complex. It is likely that customers face significant technical barriers in terms of interoperability (i.e., sharing and/or transferring data sets between cloud providers' respective platforms) and switching to competitor providers altogether. The inherent complexities are exacerbated by a perceived lack of transparency on the part of hyperscalers as to how interoperability and switching works.
- 3. Discounts:** There is evidence to suggest that the hyperscalers are further disincentivising their customers to use alternative providers via the use of "committed spend" discounts. This is where customers are rewarded by each of AWS, Microsoft and Google for committing to spend a minimum amount across each hyperscaler's respective cloud services platform for a specified period (usually years) and, in return, receive an individually negotiated percentage discount on list prices. AWS's [Enterprise Discount Program](#) and Microsoft's [Azure Consumption Commitment](#) are examples of this.

## Next steps – Market investigation

It is worth noting that, although Ofcom and/or the CMA could already take direct enforcement action, they have decided that an MIR is more suitable at this stage. Though neither regulator has specifically addressed this point, an MIR has likely been opted for on the basis that this is a complex market and the issues to be explored will need to be considered carefully. Ofcom also noted in its [Final Report](#) that enforcement action (in lieu of an MIR) is more appropriate when it relates mostly (or solely) to issues of past conduct, as opposed to issues relating to the current and future competitive dynamics in a particular market that will need to be assessed on a "forward looking basis".



As an initial stage in the market investigation, the CMA panel members will soon publish a [statement of issues](#). This is a document setting out the initial theories of harm and potential AECs that the CMA will be investigating, as well as any potential remedies that may be suitable to impose at the end of the market investigation. The hyperscalers and any other parties to whom the statement of issues will be addressed will be allowed to respond directly to this document, which will be an important opportunity for each of these entities to set out their own arguments and any specific rebuttals they wish to raise. CMA guidance notes that the issues statement is typically published 1-2 months into the market investigation, so it is likely that this will be published in November or December 2023.

At the end of the market investigation process – which will conclude in Q2 2025 – the CMA will publish its final report and take any remedial action it considers necessary to address any AEC(s) that it has confirmed following its investigation. In terms of remedial actions, the CMA can:

- (a) impose and/or accept legally binding structural and/or behavioural remedies on / from the parties; and/or
- (b) make recommendations to the UK Government to implement legislative and/or policy changes.

Market sector investigations are complex and can be burdensome, but ultimately can also result in fundamental changes to commercial practices and behaviour in a sector.

### Parallels with new EU legislation



It is telling that the key concerns raised in Ofcom's [Final Report](#) mirror some of the key proposals set out in the new Data Act ("DA") that has been proposed in the EU. These proposals, amongst other things, aim to facilitate switching between cloud and edge services through the removal of commercial, technical, contractual and organisational obstacles that would otherwise limit customers' ability to enter into contracts and port data to the other providers. In particular, the DA includes provisions for the gradual withdrawal of switching charges and imposing functional equivalence requirements on providers to limit the potential for disruption to customers as a result of switching.

These protections in the DA may be relevant to the CMA's assessment of potential remedial options in the present market investigation. More widely, it is also possible that cloud service providers could incorporate changes required by the DA into contracts offered to its UK customers in order to achieve administrative and regulatory efficiency across their European operations.

### Comment

This is a significant matter for the cloud market and reflects the importance of these services to UK businesses and consumers. The latter is evidenced by the high level of focus that the CMA has on digital markets in general and cloud-based infrastructure, products and services, in particular, which are not only esoteric but also likely to become still more ubiquitous. It is revealing that two of the most recent CMA market investigations have related to the cloud (the second concerned mobile browsers and cloud gaming).<sup>3</sup>

More broadly, the MIR also comes at a time when critical IT services – including cloud services – are under the spotlight in the UK and the EU from an operational resilience perspective in the financial services sector. The EU's Digital Operational Resilience Act ("**DORA**") and the UK's Financial Services & Markets Act 2023 both create new statutory frameworks to manage systemic risks posed by critical third parties, including cloud service providers, and will designate certain critical market suppliers into the regulatory perimeter. This will inevitably change the market landscape for the hyperscalers in the financial services sector. Furthermore, the UK has also introduced reforms to the Network and Information Systems ("**NIS**") regulations, introducing more obligations on cloud service providers to improve resiliency and expand the number of entities falling within its regulatory scope.

All in all, the regulatory storm clouds are getting darker.

<sup>3</sup> See the case page at: [Mobile browsers and cloud gaming - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

## Contact us

Should you have any queries or wish to discuss any matter in this briefing, please do not hesitate to contact our Competition and Technology Teams.



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